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JUDGES NOT POLITICIANS: WHY DECLARATIONS OF INCONSISTENCY ARE NOT A DISCRETIONARY REMEDY

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Abstract

Declarations of Inconsistency (DoIs) are formal declarations that certain legislation is inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights). In Make It 16 Inc v Attorney-General *[2021] NZCA 681, [2022] 2 NZLR 440 the Court of Appeal said at [60] that it was "well-established" that DoIs are a discretionary remedy. On appeal, the Supreme Court (*Make It 16 Inc v Attorney-General *[2022] NZSC 134 at [62]) left open the question of the approach to discretion in DoIs. This paper argues the Court of Appeal's suggestion of a "well-established" discretion was mistaken, and that the Supreme Court should not have let that suggestion hang in the air. DoIs are not a discretionary remedy: where a legislative inconsistency with the Bill of Rights has been found, a declaration must always follow. Discretion does not fit with the purpose of DoIs, which is to provide accountability in the language of the law as part of a human rights dialogue. Discretion is too uncertain and results in courts considering broader political issues, which is inappropriate and contrary to the purpose of DoIs. The remaining reasons for exercising discretion against a DoI are either redundant or mistaken. Because there are no good reasons to refuse a DoI using the discretion, the discretion is in practice illusory. The Courts should clarify that DoIs are not discretionary.*

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Subjects and Topics

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I. *Introduction*

The New Zealand Bill of Rights Act 1990 (the Bill of Rights) began with a bold vision for better human rights protection in Aotearoa New Zealand. Geoffrey Palmer's initial proposal was for a supreme law that acted as "a set of navigation lights" to "guarantee the protection of fundamental values and freedoms."[2] Despite losing the battle for a supreme law Bill of Rights, he still envisaged an ordinary statute that would provide "real"[3] protections against the "gradual whittling away of rights"[4].

Declarations of Inconsistency (DoIs) are key to making this vision a reality. DoIs were added to the judicial arsenal of Bill of Rights remedies just five years ago.[5] They are declarations by a court that certain legislation limits a right in the Bill of Rights and that that limit has not been justified.[6] Through these clear public statements, DoIs provide an accountability mechanism for those whose rights have been breached by Parliament. Yet it appears this vision may be undermined by courts declining DoIs on a purely discretionary basis.

In *Make It 16 Inc v Attorney-General*, the Court of Appeal said it "is well established [that] the court has a discretion whether to issue a declaration."[7] It cited no proper authority for this proposition.[8] And the proposition is wrong. The courts cannot decline to issue DoIs at their discretion.

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2 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 5-6.

3 (10 October 1989) 502 NZPD 13041.

4 At 13039.

5 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [*Taylor* (SC)]. DoIs have been attainable under s 92J of the Human Rights Act 1993 since 2002 only in relation to s 19 of the Bill of Rights.

6 See *Make It 16 Inc v Attorney-General* [2022] NZSC 134 [*Make It 16* (SC)] at [72] and *Chisnall v Attorney-General* [2022] NZCA 24 [*Chisnall* (results)] at [3]. But compare *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 [*Taylor* (HC)] at [79].

7 *Make It 16 Inc v Attorney*-General [2021] NZCA 681, [2022] 2 NZLR 440 [*Make It 16* (CA)] at [60].

8 Only the overturned *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 [*Taylor* (CA)] at [168].

On appeal to the Supreme Court, Make It 16 argued there was a rebuttable presumption that a DoI will be issued.[9] The Court did not accept or reject that approach, preferring to leave that question to "a case where [it] matters."[10] This paper takes Make It 16's argument a step further. Not only is there a presumption of a DoI, but to issue them is mandatory. Where an unjustified legislative inconsistency with the Bill of Rights is found, a declaration must always follow. There is no discretion. The Court should have said so in *Make It 16*. That is how DoIs provide "real" human rights protection.[11]

On the substantive question of whether Make It 16 should receive a declaration, the Court of Appeal exercised the discretion to decline a DoI, despite finding a legislative limit on a right that had not been justified.[12] That was overturned on appeal to the Supreme Court, which said "*[i]n these circumstances*, we consider we should fulfil our role which is to declare the law."[13] But that naturally begs the question: under what circumstances would they *not* fulfil their role?[14]

The answers proffered to this question have not been convincing. They include deference to the rights-breaching legislature on "quintessentially political" topics,[15] institutional competence,[16] that the legislation does sometimes operate consistently with rights,[17] and some smaller reasons.[18]

At a high level, discretion simply does not fit with the purpose of DoIs in New Zealand. Firstly, in lieu of the ability to strike down legislation, they provide what Geoffrey Palmer

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9 *Make It 16 Inc v Attorney-General* [2022] NZSC Trans 14 [*Make It 16* transcript] at 41; Emma Moran, Jason McHerron, and Graeme Edgeler, Submissions for Make It 16 Inc (appellant) in *Make It 16 Inc v Attorney-General* SC14/2022 (17 June 2022) at [51]-[52]; and *Make It 16* (SC), above n 6, at [58].

10 *Make It 16* (SC), above n 6, at [62].

11 (10 October 1989) 502 NZPD 13041.

12 *Make It 16* (CA), above n 7, at [62].

13 *Make It 16* (SC), above n 6, at [68] (emphasis added).

14 See (18 November 1997) 583 GBPD HL 546.

15 *Make It 16* (CA), above n 7, at [62]. See also *R (Chester) v Secretary of State for Justice*; *McGeoch v The Lord President of the Council and another (Scotland)* [2013] UKSC 63; [2014] AC 271 at [39]; and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38; [2015] AC 657 at [116] per Lord Neuberger P, [190] per Lord Mance JSC, and [197(d)] per Lord Wilson JSC.

16 *Make It 16* (CA), above n 7, at [62]; see Connall Mallory and Hélène Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32 KLJ 466, at 483-486.

17 *Christian Institute v Lord Advocate* [2016] UKSC 51 at [88]; and *Chester and McGeoch*, above n 15, at [102].

18 See part V.

envisioned as a "mechanism by which governments are made more accountable by being held to a set of standards."[19] They do so by requiring the Attorney-General to provide justification to the Court for Parliament's legislative rights limit. Accountability is their role in the human rights dialogue. That accountability is undermined by discretion because it makes it unpredictable whether a plaintiff will get a remedy even for a clear legislative rights breach.

Secondly, the value of the accountability DoIs provide derives substantially from the legal, and not political, nature of the court's analysis. They look rationally at the justification in the individual case, and not politically at the "dark arts of the possible."[20] This purpose is undermined when courts strategically consider whether the granting of a DoI might look too political.[21] It may be understandable for courts to be concerned by such matters; they are unelected and do not want to be labelled "enemies of the people."[22]. But such an approach undermines the purpose of DoIs to provide a purely legal analysis of the individual case.

Once political considerations are stripped away. the remaining reasons for using discretion to decline DoIs are simply redundant. Institutional competence is already built-in to the justification analysis that is part of a DoI claim. If legislation does sometimes operate consistently with rights, then the strong interpretative direction the courts take from s 6 of the Bill of Rights means it usually only operates when it is consistent.[23] There is thus no inconsistency to declare, and so discretion is unnecessary. If that approach cannot be taken, then the resulting inconsistency should be declared.[24] Any refusal to do so appears to be an example of inappropriate broader political considerations.

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19 Geoffrey Palmer, "white paper", above n 2, at 5.

20 *Make It 16* (CA), above n 7, at [62].

21 Elizabeth Adams "Judicial discretion and the declaration if incompatibility: constitutional considerations in controversial cases" (2021) PL 311 at 315.

22 See generally James Slack "ENEMIES OF THE PEOPLE: Fury over 'out of touch' judges who defied 17.4m Brexit voters and could trigger constitutional crisis" Daily Mail (United Kingdom, 4 November, 2016).

23 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551. See also Thomas Pope-Kerr "The Value of Being Honest: Why *Fitzgerald v R* Creates a Manner and Form Requirement and Why That is Good" (research paper for LAWS441 Shaping Aotearoa New Zealand's Public Law course at Victoria University of Wellington, 2023).

24 See part IV.

Each of these supposed discretionary reasons to decline a DoI are thus so flawed that they should never be used. If there is no good reason to use the discretion to decline a DoI, then any supposed discretion is illusory. That is on top of discretion not fitting with the purpose of DoIs.

This paper argues the *Make It 16* Supreme Court was wrong to let the Court of Appeal's suggestion of a supposedly well-established discretion hang in the air. It should have answered the question of the approach to DoIs as a remedy and clarified that there is no discretion.

The second part of this paper will discuss the origins of discretion in Aotearoa's DoI law and the *Make It 16* case itself in detail. It will show how discretion was assumed by the Court of Appeal in that case on very little basis.

The third part explains why discretion simply does not fit with the purpose of DoIs. It outlines their purpose, in terms of accountability and the legal (and not political) nature of the courts' analysis. It then addresses why discretion does not fit with this purpose.

The fourth part explains why, once political considerations are removed, the remaining reasons for exercising discretion to decline a DoI are either redundant or mistaken, and that discretion is thus illusory. It demonstrates that both institutional competence and the possibility that the legislation in question can sometimes operate consistently with the Bill of Rights are redundant as discretionary reasons to decline a DoI. It then addresses the few remaining minor reasons.

II. It is Not Well-Established that DoIs are a Discretionary Remedy

From the passage of the Bill of Rights until 2018 it was unclear whether senior courts could make standalone DoIs[25] separate from mere indications in a court's reasoning that legislation is inconsistent with the Bill of Rights.[26] That was until the Supreme Court in *Attorney-General v Taylor* confirmed they could.[27]

The idea was first floated by Professor Brookfield in 1992.[28] The initial judicial attention to this suggestion was cautious but not dismissive—with Cooke P saying there was a risk that the court could be seen to be introducing an "advisory opinion", but that that might be a price worth paying.[29]

The next step in DoI development was taken in two cases at the turn of the 21st century.[30] At this point there are some hints at discretion. In *Moonen* Tipping J suggested—obiter—that where an inconsistency was not justified a court "*may* declare this to be so".[31] The word 'may' here appears to be the first indication of discretion. About 6 months later in *Poumako* Thomas J would (if not dissenting) have issued a DoI, but he said it would be a "rare" case when the court would declare, rather than just indicate, an inconsistency.[32] The rest of the Court avoided answering the question.[33] It is not entirely clear whether Thomas J meant that it would be rare because of discretion, or because usually the interpretative presumption under s 6 of the Bill of Rights will cure rights-inconsistencies. Either way, neither *Moonen* nor *Poumako* discussed whether discretion was desirable or addressed it in any substantive way.

In 2009 it was still doubtful whether the courts could issue DoIs at all. Geiringer said the chances of the courts recognising such a power were "receding."[34] She did, however, note

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25 Outside the Human Rights Act, s 92J.

26 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

27 *Taylor* (SC), above n 5.

28 F M Brookfield "Constitutional Law" [1992] NZ Recent Law 231 at 239.

29 *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.

30 See also *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153].

31 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19] (emphasis added).

32 *R v Poumako* [2000] 2 NZLR 695 (CA) at [99].

33 At [42]-[42] per Richardson P, Gault and Keith JJ and [68] per Henry J.

34 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 616.

that if the jurisdiction did exist then it would be discretionary, as this was implied in some obiter comments from case law at the time.[35]

In 218 in *Taylor* a group of prisoners serving terms of less than three years sought declarations that the ban on them voting was inconsistent with s 12 of the Bill of Rights. The focus was on whether courts had the power to make DoIs. Discretion was canvassed by the Court of Appeal.[36] They provided several scenarios in which the discretion may be wielded against a DoI. They said courts may not wish to issue DoIs out of deference[37] or because the rights breach is not serious enough.[38] But they never explored whether those were matters with which courts should actually be concerned.

On appeal, the Supreme Court's treatment of discretion was far lighter. It warranted just a paragraph each in the reasons of the plurality[39] and Elias CJ,[40] in which they said they did not need to resolve how the discretion was to be applied. The only indication they gave was that utility of relief may be relevant.[41] They skipped over whether DoIs should be discretionary or mandatory. They left that issue to another day.

That other day came in late 2022; exercise of the discretion was a primary issue for the Supreme Court in the *Make It 16* case.[42] There, a group of rangatahi were seeking a declaration that the legislation preventing 16- and 17-year-olds from voting was inconsistent with the Bill of Rights. The relevant right was age discrimination under s 19—which statute specifies begins at 16.[43]

Discretion first became an issue in *Make It 16* in the Court of Appeal. The Court found s 12's guarantee of the right to vote for people over 18 did not create an exception to s 19[44]

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35 At 638-640; and Claudia Geiringer "Declarations of inconsistency dodged again" (2009) 6 NZLJ 232 at 234-235. See also more recently Amy Dresser "A Taylor-Made Declaration? *Attorney-General v Taylor* and Declarations of Inconsistency" (2019) 25 Auckland U L Rev 254 at 256; and Olga Ostrovsky "Declarations of inconsistency under the New Zealand Bill of Rights Act" (2015) 8 NZLJ 283 at 285.

36 *Taylor* (CA), above n 8, at [168]-[172].

37 At [169].

38 At [170]-[172].

39 *Taylor* (SC), above n 5, at [70] per Ellen France and Glazebrook JJ.

40 At [121].

41 At [58] per Ellen France and Glazebrook JJ.

42 *Make It 16* (SC), above n 6, at [58]-[69].

43 Via the Human Rights Act, s 21(1)(i).

44 *Make It 16* (CA), above n 7, at [28]-[32].

and that the Attorney-General had not met his burden to justify the limit on the right.[45] Despite no argument on the matter from counsel[46] and in just three paragraphs, French, Miller, and Courtney JJ nonetheless exercised their discretion against issuing a declaration.[47] The Court said the discretion was "well-established", despite citing no authorities for that proposition except the overturned Court of Appeal decision in *Taylor*.[48]

It is apparent from the above discussion of the development of DoIs that if the Court had turned its mind to the authorities it would not have been justified in making such a statement. Only the *Taylor* Court of Appeal could truly be said to have 'established' a discretion, but that judgment was appealed and the Supreme Court left the question open. The earlier hints towards discretion were brief obiter comments and a dissent. They cannot be said to have well-established a discretion.

On the substantive issue the *Make It 16* Court of Appeal exercised its discretion against issuing a DoI for three reasons. Firstly, comity or deference to the other (rights-breaching) branches of government.[49] Secondly, the Court's finding was that the Crown had not attempted to justify the voting age, not that it cannot be justified.[50] Thirdly, "[the voting age] is an intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views."[51]

The majority in the Supreme Court agreed with most of the Court of Appeal's judgment. They too found s 12 was not a barrier,[52] that it was appropriate for the courts to inquire into the consistency of the legislation[53] and that the Crown had failed to meet their burden of justifying the breach.[54] But they differed on discretion.

On discretion the Attorney-General sought to support the Court of Appeal's judgment for largely the same reasons. The Crown said that to make a DoI would be "premature" as no

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45 At [49]-[59].

46 See Moran, McHerron, and Edgeler, above n 9, at [9].

47 *Make It* 16 (CA), above n 7, at [60]-[62].

48 *Taylor* (CA), above n 8, at [168].

49 *Make It 16* (CA), above n 7, at [61].

50 At [62].

51 At [62].

52 *Make It 16* (SC), above n 6, at [35]-[40].

53 At [26]-[34].

54 At [45]-[57].

policy work had been done.[55] That in absence of the "winds of change" blowing through the electorate the Court should not express a view.[56] Other opportunities to have a say on the voting age were referred to.[57]

The majority disagreed. They said it could not be premature given Parliament was warned of the issue in at least 1986[58] and yet no policy work had been done.[59] In an apparent rejection of the Court of Appeal, it dismissed the idea that this was such a complex policy area that deference to Parliament should oust the Court's role.[60] It also pointed to several positive factors that weighed towards the granting of a DoI: that 16 and 17 year-olds are a minority; that the United Nations Convention on the Rights of the Child included a right to participation in decisions; and the "particular focus" required by the legislative choice to specify age discrimination as beginning at 16.[61]

Make It 16 themselves advocated for a stricter approach to discretion than this jumble of factors. They submitted that there should be a presumption in favour of a declaration once a finding of inconsistency has been made.[62] But the majority did not determine whether to adopt this presumption. They said the discretionary jurisprudence should develop on a "case-by-case basis".[63] They would answer that question "in a case where [it] matters."[64]

The majority in *Make It 16* erred in leaving this question open. They should have clarified that there is no discretion. I now turn to why.

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[55] At [59].

[56] *Make It 16* transcript, above n 9, at 63.

[57] *Make It 16* (SC), above n 6, at [60].

[58] When the Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 recommended at [9.14] that "Parliament should keep the voting age under review."

[59] *Make It 16* (SC), above n 6, at [64]-[65].

[60] At [66].

[61] At [67].

[62] *Make It 16* transcript, above n 9, at 41; Moran, McHerron, and Edgeler, above n 9, at [51]-[52]; and *Make It 16* (SC), above n 6, at [58]. See also AS Butler and others, Submissions for Human Rights Commission (intervenor) in *Attorney-General v Chisnall* SC26/2022 (27 March 2023) at [46]-[52].

[63] *Make It 16* (SC), above n 6, at [62].

[64] At [62].

III. Discretion Does Not Fit with the Purpose of DoIs

DoIs exist to provide accountability in the language of the law. The first, and most major, issue with discretion is that it contradicts this purpose.

The purpose can be broken into two elements. Firstly, DoIs provide accountability for plaintiffs whose rights have been breached. Secondly, they do so in legal (and not political) language. This part will outline how these elements represent the purpose of DoIs. It will also explain why allowing courts to decline DoIs at their discretion undermines this very purpose.

It is worth noting at the outset that this applies equally to DoIs under the Human Rights Act 1993[65] as well as the *Taylor* variety.

A DoIs Exist to Provide Accountability

The courts do not provide effective remedies—which is their role in the human rights dialogue—if they can simply choose not to at their discretion. Discretion undercuts their purpose as an accountability mechanism.

As can be seen from the second part, the Courts have not extensively theorised the purpose of DoIs. But there are three themes that shine through the case law. The first two were discussed by Geiringer: the Bill of Rights as a legal benchmark and as a facilitator of inter-branch dialogue.[66]

Geiringer's work is a little different from this one. She was concerned with the source of authority to make DoIs, whereas this paper looks at the purpose of DoIs. Therefore, the third narrative she discussed, the Bill of Rights as common-law fuelled, does not apply.[67]

But a third purpose does emerge from the Supreme Court's *Taylor* decision, issued after Geiringer's article. That is to provide effective relief by vindicating the rights of the plaintiff.

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[65] Sections 92J-92K.

[66] Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 553-558 and 558-564.

[67] At 564-569.

When put together the first and third purposes show that DoIs in Aotearoa are about accountability. The role of the courts in the human rights dialogue is to provide a mechanism for plaintiffs whose rights are breached by legislation to hold Parliament to account. That is how their rights are vindicated. The idea of DoIs as a declaration of the law is key to what makes this accountability mechanism valuable.

1 Dialogue as accountability

The Court of Appeal and Supreme Court in *Taylor* came to the same conclusion—that the High Court has the power to issue DoIs—for quite different reasons. The Court of Appeal said DoIs are a way for the courts to assist the political branches as part of a human rights dialogue.[68] The Supreme Court did not.[69] However, that does not mean the dialogue metaphor is inapt for DoIs in Aotearoa.

Dialogue is about the interactions between different branches of government. As Palmer J put it, extrajudicially, it simply involves different branches of government performing their usual functions. Sometimes they do so "in relation to the same topic of law or policy" that another branch is considering.[70] When that happens there is inevitable interaction between the branches. That interaction is dialogue.

The *Taylor* Supreme Court did not reject all forms of dialogue, just assistance to Parliament. They said DoIs are instead a "response… to those whose rights are affected",[71] placing emphasis on providing effective remedies under the International Covenant on Civil and Political Rights by vindicating the rights of the plaintiff. [72] That is still a properly dialogical role. DoIs exist to provide an effective remedy for the plaintiff.[73] That remedy lies in holding Parliament to account, and it is the role of the courts to do so. Accountability is the courts' role in the human rights dialogue.

This is best explored by looking at where, in the New Zealand model of dialogue, the rights dialogue actually takes place. Most dialogue theory models are about what happens after judgments are issued. In the article that sparked the flame of modern dialogue theory, Hogg

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[68] *Taylor* (CA), above n 8, at [149]-[151].

[69] *Taylor* (SC), above n 5, at [66] per Ellen France and Glazebrook JJ and [107] per Elias CJ.

[70] Matthew Palmer, Judge of the High Court of New Zealand "Constitutional Dialogue and the Rule of Law" (Key Note Address to Constitutional Dialogue Conference, Faculty of Law, Hong Kong University, Hong Kong, 9 December 2016) [Matthew Palmer, Constitutional Dialogue] at 2.

[71] *Taylor* (SC), above n 5, at [107] per Elias CJ. See also [66] per Ellen France and Glazebrook JJ.

[72] At [38]-[43] and [101]. Vindication was only mentioned in passing by Geiringer, above n 66, at 557.

[73] At [38]-[43] per Ellen France and Glazebrook JJ and at [101] per Elias CJ.

and Bushell describe court action as the "beginning of a dialogue."[74] They studied how the Canadian legislature often responds to legislation being struck down by re-enacting similar legislation that is more rights compliant.[75] Central to their thesis was that dialogue occurs when the legislature responds to court decisions.[76]

More modern models of dialogue are also limited in this way. What Geiringer has called the "radical" dialogue model has both political and judicial branches performing the same role—each weighing in on the "moral principle" of the application of human rights.[77] In looking at whether the branches disagree, this model is limited to court judgments and the subsequent legislative responses.[78]

But this only sees one of side of the coin. A key part of Aotearoa's dialogue happens before the judgment—in the court room. It is there that the Attorney-General must present a justification for the limit on rights.

The role of the Attorney-General in DoI proceedings has not yet been settled in New Zealand. It was the subject of brief discussion in the *Make It 16* hearing,[79] and longer discussion in *Chisnall*.[80] In the latter case the Human Rights Commission argued that the role of the Attorney-General is to speak for Parliament. That they are to wear their "law officer hat" and provide justification for the law that is alleged to be inconsistent.[81]

Section 5 of the Bill of Rights means that an inconsistency can be avoided if there is demonstrable justification for the rights limit. That justification must be demonstrated by

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74 Peter Hogg and Alison Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" [1997] 35 Osgoode Hall LJ 75 at 105.

75 Hogg and Bushell, above n 74.

76 See Alison Young *Democratic Dialogue and the Constitution* (Online ed., Oxford Academic, Oxford, 2017) at 2.

77 Geiringer, above n 66, at 561. See also Anna Schoonees "Dialogue and the Declaration of Inconsistency: How a bill could shape the future of New Zealand's human rights jurisprudence" (LLB(Hons) research paper, Victoria University of Wellington, 2021) at 9; and See Fergal F. Davis "Parliamentary Sovereignty and the Re-Invigoration of Institutional Dialogue in the UK" [2014] 67 Parl. Aff. 137 at 141-142.

78 This model is also subject to democratic concerns, such as those expressed in *Temese*, above n 29, at 427; and Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency, and the Limits of Judicial power" (2011) 9 NZJPIL 1 at 12.

79 *Make It 16* transcript, above n 9, at 101-102.

80 *Attorney-General v Chisnall* [2023] NZSC Trans 6 [*Chisnall* transcript] at 243-245.

81 At 243.

the entity limiting rights. In DoI claims that is Parliament—on behalf of whom the Attorney-General speaks.[82]

The act of providing a justification is a powerful one. Mureinik, a South African scholar who helped draft that country's post-Apartheid interim Bill of Rights, said human rights instruments can help movements towards a culture of justification.[83] He spoke of a culture in which the "leadership given by Government" rests not only on the fact of its authority, but on the "cogency of the case offered in defence of its decisions."[84]

In such a culture the core of human rights dialogue is justification, and thus its sister concept accountability. This is also how the courts provide an effective remedy via DoIs. The remedy they provide to a plaintiff is a formal declaration that the justification provided is not sufficient. That may not be a legal remedy in the ordinary sense given it does not change the law.[85] But it is nonetheless a remedy.

It is, therefore, the role of the courts in DoIs to provide accountability. That is their role in the human rights dialogue. The Supreme Court in *Taylor* saw DoIs as an effective (accountability) remedy for the plaintiff and not a mechanism for assisting Parliament.[86] But that role is undermined if courts have the power to decline a DoI—despite finding an inconsistency with the Bill of Rights that has not been justified—for purely discretionary reasons.

2 *Accountability is not discretionary*

This leads to a central conceptual issue with discretion in DoIs. Discretion makes receiving a DoI too uncertain, even where there is a clear unjustified inconsistency. Leckey identified uncertainty as an issue with discretion in regimes where courts can strike down legislation.[87] It is also an issue under a discretionary DoI regime.

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[82] *Make It 16* (SC), above n 6, at [45].

[83] See Etinenne Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31; and Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* at 181.

[84] Mureinik, "A Bridge to Where?", above n 83, at 32.

[85] Geiringer, above n 66, at 556.

[86] *Taylor* (SC), above n 5, at [66] per Ellen France and Glazebrook JJ and [107] per Elias CJ.

[87] Robert Leckey "The harms of remedial discretion" (2016) 14 ICON 584 at 593-594.

It also undercuts the effectiveness of the accountability mechanism to only *sometimes* hold Parliament to account. Accountability does not work if its exercise is contingent on discretionary factors. That is especially so when the reasons for declining the exercise of accountability are political.

B Judges Should not be Making Political Calculations

The accountability mechanism courts provide is particularly valuable for plaintiffs because it takes a legal, and not political, approach to human rights issues. That is a part of the purpose of DoIs: to provide remedies that are effective because they are in the language of the law. That purpose is undermined by discretion, because discretion allows courts to decline DoIs for strategic reasons like the issue being too political. This section will first explain why DoIs have this purpose, and then why discretion undermines it.

1 The value of DoIs comes from the language of law

The Supreme Court said in *Taylor* that DoIs are a "formal declaration of the law" and so a part of the judicial function.[88] It repeated this view in the *Make It 16* case with the statement that the Court's "role… is to declare the law."[89]

Geiringer has said that DoIs being a 'legal benchmark' is a source of their legitimacy.[90] But she has also argued that DoIs cannot be justified as a declaration of the law because they are not law.[91] They are not binding on the parties.[92] However, that is not what is meant by the language of the law.

Writing extrajudicially, Palmer J was the first to extend the dialogue metaphor to languages.[93] He said Parliament speaks the language of politics, a pragmatic one mired in

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88 *Taylor* (SC), above n 5, at [53] and [65] per Ellen France and Glazebrook and [94]-[95] per Elias CJ.

89 *Make It 16* (SC), above n 6, at [68].

90 Geiringer, above n 66, at 553-558

91 At 557-558.

92 At 556.

93 See Matthew Palmer "Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People" in Claire Charters and Dean Knight (eds.) We, the People(s): Participation in Governance (Victoria University Press, Wellington, 2013) [Palmer, Open the Doors] at 92-97; and Matthew Palmer, Constitutional Dialogue, above n 70, at 16-20. The metaphorical distinction between languages was missed in some early consideration of DoIs, see Chris Curran "The Declaration of Inconsistency with the

the "dark arts of the possible."[94] By contrast, courts speak the language of the (common) law. That is a language focussed on case-by-case reasoning and the rights of the individual before the court.[95]

The questions the courts ask in determining whether a limit is justified are fundamentally legal ones. They are legislative purpose, rational connection, minimal impairment, and proportionality.[96] And they are common in the law. The first is a core tenet of orthodox statutory interpretation.[97] The last can be found across the common law: in tort,[98] criminal law,[99] and possibly even judicial review.[100] These questions look at the right and the evidence in front of them on a case-by-case basis.

That is very different from the questions Members of Parliament ask. Their questions are political: does this fit with the values of the political party I represent? Will this help me win votes? Is this a priority and can I get it through my coalition partners?[101]

DoIs exist to give voice to the language of law. That is shown in the respective roles of the Attorney-General and the court. As Palmer J says, translation between the languages of law and politics is often required.[102] That is the Attorney-General's role in a DoI proceeding. They are to wear their "law officer hat".[103] They speak in the language of the

New Zealand Bill of Rights Act 1990" (LLB(Hons) Dissertation, University of Otago, 2001) at 44-45 and 75.

94 Matthew Palmer, Open the Doors, above n 93, at 93. See also Matthew Palmer, Constitutional Dialogue, above n 70, at 18.

95 Matthew Palmer, Constitutional Dialogue, above n 70, at 18. See also Matthew Palmer, Open the Doors, above n 93, at 94-95.

96 *Hansen*, above n 26, at [104] per Tipping J.

97 Legislation Act 2019, s 10(1).

98 For example, as part of the necessity defence *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [80]-[81]; and as a defence to false imprisonment *Austin v The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, [2008] QB 660.

99 For example, in self-defence Matthew Downs (ed) *Adams on Criminal Law* (online loosleaf ed, Thomson Reuters) at [CA48.08]; and the withdrawal defence to secondary liability *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [140].

100 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 3 All ER 935 at 950; *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789 at [51]-[58]; and *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 at [55]; but see *M v Commissioner of Police* [2018] NZHC 615 at [97]-[103].

101 See *Hoban v Attorney-General* [2022] NZHRRT 16 at [59].

102 Matthew Palmer, Constitutional Dialogue, above n 70, at 18.

103 *Chisnall* transcript, above n 80, at 243.

law on behalf of Parliament—to present justification to the DoI Court. The role of the court is to assess that justification against the legal benchmark of the Bill of Rights.

This can also be seen in the particular verbal form DoIs take. Recently, the courts have been moving towards declarations that simply say a limit 'has not been justified',[104] as opposed to 'cannot be justified.'[105] This reflects the separation. As the Supreme Court said in *Make It 16*, DoIs do not prevent Parliament from coming to a view that the limit is justified.[106] What is implicit in that statement is that Parliament's view may differ because it asks different questions in a different language. Parliament considers broader issues of priorities, values, and practical politics.

The accountability value of DoIs is the provision of a remedy that is not subject to such considerations and is focused on the instant case. That is probably why the first two DoIs made by the Supreme Court[107] were both brought by plaintiffs with no recourse through ordinary democratic means. They could not get a remedy by speaking the language of politics (voting), because they were prohibited from doing so. So, they turned to the language of the law for accountability. It is the purpose of DoIs to facilitate exactly that kind of legal accountability.[108]

2 Discretion opens the door to the language of politics

This legal accountability purpose of DoIs is undermined by discretion. Discretion opens the door to exactly the kind of broader political and strategic considerations from which DoIs are supposed to be free.

The Court of Appeal has repeatedly emphasised that courts can and should decline a DoI if the issue to which it relates is "very much in the public arena already" or "quintessentially political".[109] This was the approach taken by that court in *Make It 16*, and whilst the Supreme Court did not adopt this approach, it did not expressly do away with it. Indeed, it seems to be core to DoI discretion given its prominence in both the *Taylor* Court of

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104 See *Make It 16* (SC), above n 6, at [70] and [72]; and *Chisnall* (results), above n 6, at [3]. But see *Chisnall* transcript, above n 80, at 182 and 199; and AS Butler and others, above n 62, at [44].

105 See *Taylor* (HC), above n 6, at [79].

106 *Make It 16* (SC), above n 6, at [70].

107 *Taylor* (SC), above n 5; and *Make It 16* (SC), above n 6.

108 See Petra Butler, "Bill of Rights" in Mary-Rose Russell and Matthew Barber (eds.) *The Supreme Court of New Zealand: 2004-2013* (ThomsonReuters, Wellington, 2015) 255 at 264.

109 *Make It 16* (CA), above n 7, at [62]. See also *Taylor* (CA), above n 8, at [155].

Appeal's decision[110] and the United Kingdom (UK) jurisprudence.[111] The latter has included declining a DoI because the only purpose it would serve is to "further [a] political campaign."[112]

Some say the Supreme Court's decisions to issue DoIs related to politically charged issues of voting rights[113] are examples of judges straying into politics. This was seen in the reaction of several public commentators to the *Make It 16* decision.[114]

It can even be seen in the National Party response to the DoI in that case. They have often said it was inappropriate for courts to make judgments like this.[115] That is despite voting for the legislation that expressly affirmed the ability for the courts to issue DoIs.[116] They explicitly agreed with the Court of Appeal's approach in the *Make It 16* case.[117]

But they are mistaken. Declining to issue a DoI despite finding an unjustified limit on a human right would be more political than simply declaring the law. By doing so the Court is not looking at the individual case and the purely legal questions involved, it is straying

110 *Taylor* (CA), above n 8, at [169]-[172]. See also *Gordon v Attorney-General* [2023] NZHC 2332 at [207] and [215]-[217], albeit that case found the relevant rights limits were justified, see [165], [186] and [202].

111 See *Chester and McGeoch*, above n 15, at [39]; *Nicklinson*, above n 15, at [116] per Lord Neuberger P, [190] per Lord Mance JSC, and [197(d)] per Lord Wilson JSC; and (18 November 1997) 583 GBPD HL 546.

112 *R (Rusbridger) v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357 at [58]. This is echoed by comments about the "utility of relief" in *Taylor* SC, above n 5, at [58].

113 *Taylor* (SC), above n 5; and *Make It 16* (SC), above n 6.

114 Ben Thomas "Activist courts stepping on legislators' toes" Stuff (online ed, 24 November 2022); Josie Pagani "Supreme Court breezily strikes a blow against democracy" Stuff (online ed, New Zealand, 25 November, 2022); Anna Whyte "Voting age judgment 'intruding': National says leave it to Parliament" Stuff (online ed, 22 November 2022); David Seymour "ACT rejects lowered voting age" (press release, 21 November 2022); and Liam Hehir "The disappointing but not surprising Supreme Court decision" (21 November, 2022) The Blue Review <https://www.patreon.com/posts/disappointing-74921252>. The last of these says that, to reduce the politicisation of the judiciary, Parliament should be able to remove judges over decisions they disagree with. This argument requires bending the intellectual arc so far towards foolishness that it might just break.

115 Whyte, above n 114; and Justice Select Committee *Declaration of inconsistency: Voting age in the Electoral Act 1993 and the Local Electoral Act 2001* (19 May 2023) at 16-17.

116 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022; (27 May 2020) 746 NZPD 18229; (11 May 2022) 759 NZPD 9483; and (23 August 2022) 762 NZPD 11729.

117 (29 August 2023) 771 NZPD (New Zealand Bill of Rights Act Declaration of Inconsistency—Voting Age in the Electoral Act 1993 and the Local Electoral Act 2001, Paul Goldsmith).

into an assessment of the broader political context. That is the language of politics, and it is not appropriate for the courts to speak it. Doing so undermines the value of DoIs and has the potential to subject cases to what Lady Hale DP called the "the personal opinions of professional judges."[118]

MacFarlane has looked extensively at how the Supreme Court of Canada makes strategic decisions in crafting remedies under the supreme law Canadian Charter of Rights and Freedoms.[119] This was highlighted by Leckey as a concerning aspect of the remedial discretion Canadian courts have.[120] While New Zealand courts do not have the capacity to strike down legislation, and so the remedial discretion is different, the fact is any discretion opens up the scope of considerations to include political matters.

The same kind of institutional political science lens MacFarlane used to study the Canadian Supreme Court has not been applied in New Zealand. But Aotearoa does have a close case study in the UK. Under s 4 of their Human Rights Act 1998 (UKHRA), courts have an explicit statutory power to issue declarations of incompatibility (DoIs). Section 4 is also explicitly discretionary.[121] Adams has observed that this power too has been used strategically.[122]

She divides the DoI process into two spaces—the legal one in which the courts decide whether to issue a DoI; and the political one in which Parliament decides whether to change the law.[123] This mirrors the languages approach. She says what happens in the latter is influencing the former. That courts make strategic decisions over when to use their discretion to issue a DoI. They may be less likely to issue a DoI if they think they will be overturned, as they are worried about the political consequences.[124] A "declaration might be institutionally disrespectful, possibly triggering political backlash."[125]

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118 *Nicklinson*, above n 15, at [325] per Lady Hale DP.

119 Emmett MacFarlane *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (University of British Columbia Press, Vancouver, 2013); and Emmett MacFarlane "The Supreme Court of Canada and its Judicial Role: An Historical Institutionalist Account" (PhD Thesis, Queen's University (Canada), 2009).

120 Leckey, above n 87, at 597.

121 Using the word "may".

122 Adams, above n 21, at 315.

123 At 312 and 314-315; see also Chintan Chandrachud "Reconfiguring the discourse on political responses to declarations of incompatibility" (2014) PL 624.

124 Adams, above n 21, at 315 and 319-320.

125 At 324.

Given the similarity of the DoI regimes between the UK and New Zealand, this is concerning to see. In each of these spaces a different language is meant to be spoken. The value of DoIs is that they provide a space in which only legal language is used. But discretion leaves the door ajar for political language to creep in. The Supreme Court in *Make It 16* should have shut that door by making clear that there is no discretion in DoIs.

Similarly, UK Courts have been reticent to issue DoIs where doing so would crossover with a DoI already made. In *Chester and McGeoch* the UK Supreme Court declined a DoI on prisoner voting rights because one had already been made a little under 7 years earlier which put the issue under "active consideration" by Parliament.[126] This approach falls into the same trap. As Mallory and Tyrrell observed, it involves judges acting strategically to avoid inserting themselves into political and media debates they know are ongoing.[127] They are worried about what might happen in the political sphere. Discretion thus results in judges inappropriately speaking the language of politics.

If the courts do wish to avoid political media coverage, then declining DoIs because the issue is too political does not achieve this goal anyway. When the Court of Appeal declined the DoI in the *Make It 16* case on these grounds, the judgment was reported by media as ruling against lowering the voting age.[128] It still appeared the courts were acting politically.

There is, therefore, no discretion to decline DoIs for political reasons. It goes against their purpose to allow this. As Heath J said in the High Court in *Taylor*, "[a]ny political consequences of [DoIs] can be debated in the court of public opinion, or in Parliament."[129]

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126 *Chester and McGeoch*, above n 15, at [39]. The first DoI was made in *Smith v Scott* (2007) CSIH 9, 2007 SLT 137.

127 Mallory and Tyrrell, above n 16, at 478.

128 See Ireland Hendry-Tennent "Court of Appeal dismisses case to lower New Zealand's voting age to 16" *Newshub* (online ed, 14 December 2021); and Tom Hunt "Court of Appeal rejects attempt to lower NZ voting age" *Stuff* (online ed, 14 December 2021).

129 *Taylor* (HC), above n 6, at [70].

IV. The Discretion is Illusory Because there are no Good Reasons for Exercising it Against a DoI

Once these political considerations are stripped away, other reasons for declining DoIs at the courts' discretion are either redundant or mistaken and should never be used. Given there are no good reasons to exercise discretion, it does not practically exist. It is illusory. The courts should clarify there is no discretion.

The two major remaining reasons are a) institutional competence and b) the legislation does not always operate inconsistently with the Bill of Rights. As to a), institutional competence is already built into the justification analysis. As to b), when DoIs are declined because it is possible for the legislation to operate consistently with the Bill of Rights (whether or not it does in the instant case) it is not because of discretion, but because there is no inconsistency to declare. But if there is an inconsistency (even if it does not always arise), the courts should declare it.

A Any Institutional Competence Concerns Should be Addressed by s 5

Turning first to institutional competence, this is why the Court of Appeal in *Make It 16* declined a DoI in that case.[130] It is also a reason quite frequently cited by UK courts, although as Mallory and Tyrrell note it has been a site of great judicial "divergence".[131]

The situations in which institutional competence will be a genuine barrier to the court's consideration of a DoI are likely to be rare. That is for two reasons. Firstly, the courts must always keep in mind that they are answering fundamentally legal questions, leaving the political ones to Parliament.

Secondly, Keith J has, extrajudicially, described how when drafting the Bill of Rights he and his colleagues were very deliberate not to include too many substantive rights.[132] They also intentionally framed the few substantive rights they did include, such as freedom from discrimination, in narrow terms so as to avoid undue judicial interference in matters, such as economics, in which the courts have very limited institutional expertise.[133] This

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130 *Make It 16* (CA), above n 7, at [62]. Albeit it did not trouble the Supreme Court in that case, see *Make It 16* (SC), above n 6, at [66].

131 Mallory and Tyrrell, above n 16, at 483-486.

132 Kenneth J Keith "The New Zealand Bill of Rights Act 1990: An Account of its Preparation" (2013) 11 NZJPIL 1 at 9. See also Geoffrey Palmer, "white paper", above n 2, at 28.

133 Keith, above n 132, at 9.

substantially narrows the potential for Bill of Rights matters to be outside the competence of the judiciary.

But where such issues do arise the Bill of Rights already has a mechanism for dealing with them. That is s 5. It is a general limitation clause in the sense that all rights are subject to it.[134] It says any limit on those rights must be justified. That means before courts arrive at the supposed discretionary step, they must have already found not just an inconsistency with rights, but one that has not been justified.[135]

The courts have already baked-in institutional competence concerns into the s 5 analysis. This was expressed in *Hansen*, where Tipping J said that, within s 5, "[h]ow much latitude the Courts give to Parliament's appreciation of the matter will depend on a variety of circumstances."[136] That latitude was applied in *Child Poverty Action Group*, where the Court of Appeal placed particular emphasis on the leeway given in cases that involve the "complex interaction of a range of social, economic, and fiscal policies".[137] This leeway has been variously described as a "margin of appreciation"[138] and a "range of reasonable alternatives".[139]

But whichever way it is put, this leeway exists to recognise the limited institutional capacity of the courts in particularly complex social and economic matters. That is exactly the same thing that underpinned the concerns of the Court of Appeal in *Make It 16* in declining to exercise its discretion and grant a DoI. While the Supreme Court said in that case the issue was not too complex, it did not rule out taking this approach to discretion in a different case.[140]

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[134] Butler and Butler, above n 83, at 160.

[135] See *Taylor* (CA), above n 8, at [153]. Sometimes courts have determined that a right is not subject to s 5 (for example s 9). But that is because a breach of that right is said never to be justifiable, so justification (and the associated institutional competence assessment) is still a part of the matrix. See *Fitzgerald*, above n 23, at [38] and [78] per Winkelmann CJ, [241] per Glazebrook J and [160] per O'Regan and Arnold JJ; and Petra Butler, above n 108, at 266.

[136] *Hansen*, above n 26, at [116].

[137] *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91].

[138] *Hansen*, above n 26, at [118] per Tipping J, adopting the European concept recently discussed in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 556.

[139] *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [132]-[134] and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [151]-[153], adopting *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [160].

[140] *Make It 16* (SC), above n 6, at [66].

That is a problem. It leaves the Attorney-General with two bites at the institutional competence cherry: once in s 5, and once in discretion. That much is illustrated by comments from some judges in the *Make It 16* hearing that the Crown's arguments about s 5 and remedial discretion melded into one.[141] Not only is this more than a little unfair, but it also leads to doctrinally incoherent results. It does not make sense to say that the court was sufficiently competent to determine whether the limit was justified, but not sufficiently competent to issue a declaration to that effect.

A more coherent position is to determine whether the issue falls within the margin of appreciation afforded by s 5 that the courts are competent to draw. If it does, then the limit has been justified. If it does not, then a declaration must follow.[142] It is unnecessary and inappropriate for the courts to decline to issue DoIs for institutional competence reasons.

B Inconsistent Inconsistencies Should not be a Barrier

Another redundant reason to exercise the discretion against issuing a DoI is where it is possible for the legislation to operate in a rights-consistent manner, whether or not it did in the case before the Court. UK courts have frequently cited this as a reason to exercise their discretion.[143] It is, therefore, worth discussing whether such an approach would be appropriate in Aotearoa. It is not. That is because New Zealand courts declining DoIs for this reason would be doing so either be because there is no inconsistency in the legislation (and thus not because of discretion), or because of broader political or strategic factors that are (as has already been discussed) inappropriate for the courts to consider.

As a preliminary point, these cases include those where, as the then Lord Chancellor Lord Irvine said in debates in the House of Lords on the UKHRA, there is an alternative statutory appeal route for the claimant.[144] But in these cases there is no need for discretion at all. If an alternative legal order—such as the overturning of a rights-inconsistent decision on appeal—will cure the rights-inconsistency, then there is no such inconsistency to declare.

It also includes cases where the legislation sometimes operates consistently with the Bill of Rights, and sometimes does not. These may be termed rights-ambivalent provisions.

141 *Make It 16* transcript, above n 9, at 73.

142 See AS Butler and others, above n 62, at [50].

143 See Mallory and Tyrrell, above n 16, at 478-483.

144 (18 November 1997) 583 GBPD HL 546.

Mallory and Tyrell split these cases into those where the inconsistency does and does not arise in the present case.[145]

Where the inconsistency does arise in the present case the answer is simple: it should be declared. The UK cases[146] in which DoIs have been declined for rights-ambivalent provisions have concerned empowering provisions that allow public authorities to make decisions that are sometimes consistent, and sometimes inconsistent, with rights in the European Convention on Human Rights (ECHR).[147] But those cases must be viewed against the background of s 6(1) of the UKHRA, which requires public authorities to operate their statutory powers consistently with ECHR rights.[148] That means that if legislation can sometimes be operated consistently, then the relevant authority is bound to only apply it where that is the case, unless the legislation is clearly intended to result in rights-inconsistent treatment.[149] Where the legislation operates inconsistently with ECHR rights, it does not apply. Therefore, DoIs are not declined in such cases due to discretion, they are declined because there is no inconsistency to declare.

There is some dispute in the UK over whether the UKHRA s 6(1) direction truly does save legislation. Lord Kerr JSC, while dissenting in *Nicklinson*, said the fact a statutory power was capable of being operated consistently did not save it from a DoI.[150] This is despite the s 6 requirement. He considered the legislation should be assessed on its own.[151]

But no such debate need arise in Aotearoa, because our equivalent of the UKHRA s 6(1) requirement occurs via the reading-in of provisos as part of a rights-consistent interpretation process.[152] In *Fitzgerald* the New Zealand Supreme Court said it is possible, under s 6 of the Bill of Rights, to read provisos into legislation that rights-ambivalent

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145 Mallory and Tyrrell, above n 16, at 478-483.

146 See, for example, *Christian Institute*, above n 17, at [88]. See also *Make It 16* transcript, above n 9, at 41-42.

147 Which the UKHRA protects.

148 *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79, [2016] 1 WLR 210 at [2]. See also Mallory and Tyrell, above n 16, at 481-482.

149 UKHRA, s 6(2).

150 *Nicklinson*, above n 15, at [362]-[365].

151 See also *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88 at [102] per Lord Kerr JSC; and Shona Wilson Stark “Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998” (2017) 133 LQR 631 at 651-652.

152 Jason Varuhas “The Principles of Legality in Aotearoa New Zealand” (2023) 33 PLR (forthcoming) at 24-28.

provisions only apply when they operate consistently with the Bill of Rights.[153] If a *Fitzgerald* proviso is read-in, that means the legislation is not inconsistent, because it does not operate where to do so is inconsistent. In Aotearoa the DoI would not be declined in such cases at the discretion of the court, but simply because there is no inconsistency to declare.

If the legislation is so clearly intended to permit inconsistencies that the *Fitzgerald* approach cannot be taken, then a DoI must follow. Legislation should not be saved by the hope of a benign administrator willing to disapply its harsher edges. That is both fanciful and would mean courts inappropriately considering matters beyond the individual case.

The same must surely apply even if the treatment of the individual in the particular case in front of the court has not resulted in an inconsistency, but the rights-ambivalent provision is still capable of operating inconsistently in some instances. Again, the *Fitzgerald* approach to interpretation will usually cure these errors.

Where it does not cure them, it may be a fair concern to avoid providing DoIs "in abstracto".[154] But that concern is insubstantial. The extreme abstracto cases are dealt with by the doctrine of standing. Although New Zealand's standing rules are rightly described as "permissive",[155] the Supreme Court did have to search for a connection between Mr Taylor and the legislation he challenged.[156] That weeds out cases where there are no facts at all to be compared against. We are dealing only with cases where the facts are close enough to inconsistency that the courts can confidently make the assessment that an inconsistency may arise.

What truly appears to underpin the abstracto concern is what Lord Roger said in *Rusbridger* (albeit that was a case about a DoI declined for similar but differing reasons), that courts should not issue DoIs where the only "favourable outcome" is a DoI the plaintiffs "could use to further [a] political campaign."[157] But the courts should not be worried about that.

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153 *Fitzgerald*, above n 23. See Pope-Kerr, above n 23.

154 *Chester and McGeoch*, above n 15, at [102]. See Mallory and Tyrell, above n 16, at 478-480.

155 Helen Winkelmann "The power of narrative – shaping Aotearoa New Zealand's public law" (paper presented to the Making and Remaking of Public Law Conference, Dublin, 6-8 July 2022) at 1. See also *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094, at [18].

156 See *Taylor* (SC), above n 5, at [68]-[69] per Ellen France and Glazebrook JJ, [70] per Elias CJ, and [145] per William Young and O'Regan JJ.

157 *Rusbridger*, above n 112, at [58].

This is exactly the kind of broader political consideration, as discussed above, that the courts should avoid.

There is also a strong argument that in these cases courts should not wait for someone to be victimised before holding Parliament to account for its rights breach.[158] As Lord Kerr JSC pointed out in *Beghal*, the administering authority choosing to act consistently in one case does not prevent the law from being inconsistent.[159] If the purpose of DoIs is legal accountability, then it is not well served by an abstracto prohibition.

Additionally, the Supreme Court in *Taylor* explicitly left open the possibility of public interest standing.[160] This may even have been applied in *Make It 16*, given the incorporated society that brought the case may have been made up of 16- and 17-year-olds, but itself was not affected by the voting age. This was never challenged, and so we do not know.[161] But a discretionary tendency to decline DoIs where the plaintiff was not personally treated inconsistently with the Bill of Rights would totally undercut public interest standing.

Therefore, most of the reluctance of the UK courts to issue DoIs for rights-ambivalent provisions stems not from discretion but from the lack of an inconsistency. Any remaining discretionary reluctance for these reasons cannot be squared with the legal accountability purpose of DoIs. This cannot be a good reason to decline DoIs.

C The Minor Reasons Proffered for Refusing a DoI Using the Discretion

There are just four remaining reasons that have been found that the courts may use to decline a DoI using their discretion. They can all be dealt with briefly as they are all poor.

Firstly, the Court of Appeal in *Taylor* mentioned the lack of a s 7 report on the rights-inconsistency of the legislation in question may count against a DoI.[162] The Supreme Court in *Make It 16* was correct to ignore this factor, despite there being no s 7 report in that

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[158] Mallory and Tyrell, above n 16, at 480.

[159] *Beghal*, above n 151, at [102]. The difference explained above between the UKHRA s 6 and New Zealand *Fitzgerald* approaches is not relevant as here we are assuming that the legislation is so clearly intended to operate inconsistently that no *Fitzgerald* proviso can apply.

[160] *Taylor* (SC), above n 5, at [68].

[161] I know this from personal experience, and it is not mentioned in any of the judgments. *Make It 16* (SC), above n 6; *Make It 16* (CA), above n 7; and *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, [2020] 3 NZLR 481.

[162] *Taylor* (CA), above n 8, at [155].

case.[163] If anything, the lack of a s 7 report indicates a greater need for accountability as Parliament has not been informed of the rights-inconsistency.[164] A DoI would give Parliament an opportunity to grapple with the inconsistency.[165]

Secondly, the Supreme Court in *Make It 16* similarly disregarded the Court of Appeal's reasoning that a DoI would be inappropriate given the court had only found the inconsistency had not been justified, not that it could never be.[166] The Supreme Court was correct to do so. Parliament should not avoid accountability by refusing to engage in it, that both undercuts the purpose of DoIs and effectively flips the justification burden which properly lies on the Crown.[167] It also does not make sense in light of the abovementioned shift in the form of DoIs from what 'cannot be justified' to what 'has not been justified'.[168]

Thirdly, it was suggested by counsel for Make It 16 in their case that if a DoI undermined a criminal conviction then that could be a compelling reason to refuse it.[169] An example may be *Momcilovic*, although that case was concerned with whether DoIs were a valid power at all in Australia.[170] But legal accountability for Parliament is even more important when the consequences are as severe as a criminal sentence. If a criminal law is inconsistent with the Bill of Rights, the courts should say so. The usual reticence towards declarations in a criminal context does not apply, as it is a declaration as to inconsistency with the Bill of Rights, not as to fact-specific illegality.[171] It is at a higher level of abstraction.

Lastly, there is a suggestion in the *Taylor* Court of Appeal's judgment that a court may decline to exercise its discretion if the breach of human rights in question does not "raise a

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163 Despite the voting age provisions having no s 7 report due to their progressing through the House (Electoral Act 1993) before the expansion of prohibited grounds of discrimination to include age over 16 under s 19 of the Bill of Rights (Human Rights Act, s 145).

164 As the passages in *R v Poumako*, above n 32, at [66] cited by *Taylor* (CA), above n 8, at [155] appear to indicate.

165 New Zealand Bill of Rights Act, ss 7A and 7B; and New Zealand Parliament *Sessional Orders (53rd Parliament) as at 12 June 2023*, at 6-8.

166 *Make It 16* (CA), above n 7, at [62]. The Supreme Court never mentioned this, except in summarising the judgment below, see *Make It 16* (SC), above n 6, at [22].

167 Moran, McHerron, and Edgeler, above n 9, at [12]-[13].

168 Compare *Taylor* (HC), above n 6, at [79]; *Make It 16* (SC), above n 6, at [70] and [72]; and *Chisnall* (results), above n 6, at [3].

169 *Make It 16* transcript, above n 9, at 41-42.

170 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

171 *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [110]-[117] per Winkelmman CJ, William Young, Glazebrook, and O'Regan JJ and [125]-[126] per Ellen France J.

serious issue justifying a remedy, still less a remedy of such importance."[172] That New Zealand's busiest appellate court considers that some rights-inconsistencies may "raise no issue of genuine public or private interests to justify troubling the legislature" is deeply concerning.[173] If a court really considers that a prima-facie inconsistency is so insignificant then there it will surely be a justified limit under s 5. No discretion is necessary.

It is revealing that after this survey of the cases I have found no good reason to decline a DoI at the courts' discretion. It reveals that there is no real discretion in DoIs. If there are no good reasons to exercise the discretion against issuing a DoI, then the discretion is illusory. The courts should clarify that there is no discretion.

172 *Taylor* (CA), above n 8, at [170].

173 At [170].

V. Conclusions

DoIs are not a discretionary remedy. Discretion does not fit with their purpose and there are no good reasons for exercising it. That means it is both doctrinally incoherent and in practice illusory. The Supreme Court in *Make It 16* should have said so. In lieu of that, the Supreme Court in *Chisnall*, or at another opportunity, should make it clear that discretion has no place in DoIs.[174]

Aotearoa's courts play an important constitutional role when issuing DoIs. That is to provide accountability in the language of the law. That is how they vindicate the plaintiff's rights. They provide this accountability by requiring the Attorney-General, on behalf of Parliament, to provide a justification to the Court for the rights inconsistency. Most dialogue models miss that this is a key dialogical role that occurs in the courtroom, not after the judgment.

It is important to distinguish between what the DoI Court does and what happens afterwards. As Make It 16 said after their case, a DoI "places the ball squarely in Parliament's court to respond effectively."[175] But Parliament's response is in a different language. That is the language of politics, where the questions are about values, votes, and the "dark arts of the possible".[176] Parliament considers broader issues of priority and practical politics. By contrast the language of the courts, including in DoIs, is the law. They look at the individual case and ask questions like purpose, rational connection, and proportionality.

Much of the value DoIs provide as an accountability mechanism lies in this legal language. It gives plaintiffs an avenue to have their individual case looked at without broader political considerations getting in the way. But discretion opens the door to courts considering whether an issue is too political or strategizing over what the political response might be. It also introduces a concerning level of uncertainty as to whether the accountability will be exercised. Discretion therefore undermines the accountability purpose of DoIs.

Once these political considerations are stripped away, there are no good reasons for exercising discretion. In practice, no discretion therefore exists. Courts do not need discretion to defer to Parliament on institutional competence grounds when they may

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174 *Attorney-General v Chisnall* [2022] NZSC 77.

175 Make It 16 "Submission to the Justice Select Committee on its consideration of the Supreme Court's declaration that the voting age of 18 is inconsistent with the Bill of Rights" at [6].

176 Matthew Palmer, Open the Doors, above n 93, at 93.

already do so when considering whether the limit is justified. They also do not need discretion to avoid issuing DoIs when a law can operate consistently with the Bill of Rights; if the interpretation exercise cures the inconsistency, then there is nothing to declare. If it cannot, then a DoI should follow.

This paper argues the courts should take the next opportunity to clarify that DoIs in New Zealand are not a discretionary remedy. Doing so would bring this country closer to having real human rights protections. It would create a true culture of justification, and not avoidance. It would make the declaration of inconsistency remedy meaningful and more coherent. And it would do it all while actually reducing the politicisation of the courts.

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